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No. [redacted] 103

In the

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1961

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Myrph Johnson, an illiterate, Negro male, prays that a writ of certiorari issue to review the final judgment of the Court of Criminal Appeals of Texas, entered in the above-entitled cause.

OPINIONS BELOW

This cause was originally reversed and remanded by the Texas Court of Criminal Appeals. Thereafter, this order was withdrawn and the Court has rendered three other majority opinions and one dissenting opinion, finally affirming judgment against Petitioner without written opinion.

These opinions are not yet reported, but all of the opinions, other than the one withdrawn, are printed in the Appendix hereto, infra pages 17-27, and likewise appear in the Record.

JURISDICTION

The Court of Criminal Appeals of the State of Texas is the Court of last resort in Texas in all matters within its jurisdiction. Its judgments and orders are not reviewed by the Texas Supreme Court, or by any other Texas Court. The jurisdiction of this Court is invoked under *28 U.S.C. Section 1257 (3)*.

QUESTIONS PRESENTED

Whether Petitioner was denied due process of law and equal protection of the laws when, while serving a jail sentence, and after a conditional bond forfeiture had been entered against him, had final judgment of forfeiture rendered at a hearing, when:

a. Petitioner (a principal "party" to the suit) was given no notice of the hearing.

b. When Petitioner was not present during the presentation of the case against Petitioner.

c. When Petitioner was not present during the presentation of his sureties' defense except when he, Petitioner (although a "party" to the suit) was brought from jail and testified only as a "*witness*" in the cause, and was immediately thereafter, *by direct order of the Trial Court*, returned to jail; and, *in his involuntary absence*, other evidence was heard.

d. When Petitioner was not advised by the Trial Court holding the hearing that he was a "party" to such proceedings, and was entitled to be represented by counsel, to call witnesses, and to argue in his own behalf.

e. When Petitioner was not present before the Court when final judgment was rendered against him by the Trial Court, he having been taken from the Court, prior to the pronouncement of judgment, by the bailiff of the Court, and returned to jail by direct order of the Trial Court.

Whether under the peculiar facts of this case, the Petitioner has been accorded that fundamental fairness necessary to the administration of justice and due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent statutory and constitutional provisions are printed in the appendix beginning on pages 11-16.

STATEMENT OF THE CASE

I. When and How the Federal Constitutional Questions Were Raised.

The federal constitutional questions were first raised in the County Criminal Court of Dallas County, Texas, on Petitioner's Motion for New Trial, after discovering that final judgment of bond forfeiture had been rendered against him, without notice and in his absence (R. 16-25) (Bill of Exception No. 3). Exception was taken in that Court to the overruling of the Motion (R. 26). The federal constitutional questions were thereafter urged, at each stage, on appeal (R. 114-141, R. 211-214, R. 218-222).

II. The Proceedings in the County Criminal Court of Dallas County, Texas.

The Petitioner, after judgment nisi (in Texas a "conditional" judgment) was entered on his failure to appear for trial, thereafter, and *before entry of Final Judgment of Bond Forfeiture*, surrendered, was tried for Driving While Intoxicated and on his plea of guilty, sentenced to thirty (30) days confinement in jail and fined Fifty Dollars ($50.00) and costs. The Petitioner was serving this sentence when the "statutory hearing" on the Final Forfeiture was had (Code of Criminal Procedure, Art. 437, appendix, infra, page 14). After the State had presented its evidence, and after the sureties, who had filed a written answer, setting up, among other things, the surrender and trial of Petitioner, had examined one witness, Petitioner was brought from the County Jail and examined as a "witness" by both the sureties and the State. Immediately after he finished testifying as a "*witness*", he was; by direct order of the Trial Court returned to the County Jail, and the hearing then proceeded, in his absence, and resulted in entry of Final Judgment of Forfeiture. Petitioner was not represented at the hearing by counsel and was not informed by the Court that he had a right to be present and participate in the hearing on its merits, nor was Petitioner advised that he was a "party" to the proceedings, that he was entitled to counsel, if he so chose, that he was entitled to call witnesses, or argue in his own defense. The Statement of Facts in the bond forfeiture hearing (R. 45-113A) reflects the testimony heard, but does not reflect

all of the facts complained of by Petitioner, and such facts are set out in Petitioner's *Bill of Exception No. 3*, (R. 35-40), and which Bill of Exception No. 3 was approved and allowed by the Trial Court with explanation (R. 41-42). *A reading of Bill of Exception No. 3, as allowed and approved by the Trial Court, will give all of the facts surrounding the matters pertinent to this Petition.*

III. The Decisions of the Texas Court of Criminal Appeals.

On appeal, the Court of Criminal Appeals of Texas, originally reversed and remanded Petitioner's case. Thereafter, this order was withdrawn, and the judgment of forfeiture was ruled excessive by Five Hundred Dollars ($500). This opinion was delivered June 14, 1961, with a dissenting opinion by the presiding judge (R. 190-194, appendix, infra, pages 17-20). Thereafter, on the State of Texas' Second Motion for Rehearing, the forfeiture as to Petitioner was affirmed in its full amount (R. 208-210, appendix, infra, pages 21 to 23). Thereafter, on Petitioner's Motion for Rehearing wherein Petitioner again raised constitutional questions, the Court affirmed the full forfeiture against Petitioner, but without in anywise discussing the constitutional questions presented in his Motion for Rehearing and in this Petition for writ of certiorari (R. 215-217, appendix, infra, pages 24 to 26). Thereafter, Petitioner filed a Second Motion for Rehearing, again raising the constitutional questions (R. 218-223), but the Court of Criminal Appeals overruled this Motion without written opinion on February 14, 1962.

REASONS FOR GRANTING THIS WRIT

1. Petitioner had adjudged against him a bond forfeiture in the amount of $750.00, the full amount of his bond, without being accorded a "hearing" conducted with that fundamental fairness necessary to the due administration of justice, *Lisenba v. People of California, 314 U. S. 219.*

The Supreme Court of Texas, in *Burgemeister v. Anderson, 259 S. W. 1078*, held that the Statutes of the State of Texas pertaining to bond forfeitures, appendix, infra, pages 11-16 "admit of no other construction than that the principal is a "party" to the judgment nisi *and all subsequent proceedings*, and is both required and *entitled* to show any good and sufficient cause why the interlocutory judgment should not be made final." The Court, speaking through Justice Greenwood, further stated "By the judgment nisi the Court acquires jurisdiction to adjudicate the matter of enforcing the Principal's obligation to the State, as well as that of the sureties, and, on the Principal's appearance and tender of issues excusing his failure to appear at the time of forfeiture, *the statutes entitle him to both a hearing and a determination* as to whether the judgment nisi shall be vacated in whole or in part or shall be made final."

2. After Petitioner surrendered and was tried, his sureties filed an Answer as provided by State Statute setting up such surrender and conviction, and asking for a remission therein provided. The pleadings of Petitioner's sureties, not being separate or personal to these sureties, but going into the whole question of remission because of the prior sur-

render and trial of the Petitioner, was a defense available to, and operated in favor of Petitioner. *Turner v. Commonwealth (Ky), 188 S. W. 404.* Articles 436, 437, 438, 439 and 440, Code of Criminal Procedure of the State of Texas, appendix, infra, pages 13-16.

3. The Petitioner, under the Texas Statutes, being entitled to a fair hearing, the Trial Court in holding the hearing in the manner set out herein, and without advising the Petitioner of his rights, has been denied due process of law. Petitioner unquestionably had a right to be heard, to call witnesses, to be represented by counsel, and to argue to the Court in his own behalf; but, not being advised that he was even a party to the proceedings, the hearing held, principally during his *involuntary* absence, was not a hearing in accordance with due process of law. This Honorable Court has asserted that the right to be present when the Petitioner's presence has a reasonably substantial relation to the opportunity to be heard, and his right to be confronted with witnesses, is consonant with due process of law under the Fourteenth Amendment to the United States Constitution. *Snyder v. Commonwealth of Massachusetts, 291 U. S. 97.*

4. The right to a hearing required a judicial examination of every issue that, according to established procedure, may affect the attainment of a legal trial, and in such trial determine the cause according to law. This includes the opportunity to cross-examine witnesses and to produce witnesses and to be heard on question of law, in person or by attorney. These rights were denied Petitioner. Attention is

specifically called to Article 426 of the Code of Criminal Procedure of the State of Texas, which provides that *citation* or *notice* at the time that the conditional forfeiture is entered need not be issued to the Principal on a bond. The Petitioner, being the Principal on the bond involved, was not served with any type of notice and, when he was brought into Court by the bailiff, in a proceedings in which he was a "party", was entitled to notice from the Trial Court as to the nature of the proceedings then going on, and Petitioner says that the Court further should have advised him of his other legal and constitutional rights in order that he might have an opportunity to present his proper defense. *Cooke v. United States, 267 U. S. 517.*

5. The amount in controversy is not a substantial sum. The expenses incident to the appeal to the Court of Criminal Appeals of Texas and of this Petition for a writ of certiorari far exceed the final judgment of forfeiture, that is, $750.00; however, it is not the amount of money involved in this case, but the constitutional rights that every citizen has, and which should be protected. The Petitioner, an illiterate Negro, by being brought into Court from jail, examined for the benefit of other parties, forcibly removed from the courtroom, and without notice that he was a party to the proceedings, and without being advised of his rights, has been deprived of due process of law. The question in this case is not whether the granting of these rights to Petitioner would have lead to a different judgment, but due process requires that a reasonable opportunity for exerting these influences on the Court's judgment be afforded. *Cooke v. U. S.*, supra.

CONCLUSION

For the reasons stated, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

T. K. IRWIN, JR.,

IRWIN AND IRWIN, *Attorneys*,
215 Mercantile Continental
Building;
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Attorneys for Petitioner.

April, 1962

CERTIFICATE

I hereby certify that the facts set forth in the above application are duly verified by T. K. Irwin, Jr., Petitioner's attorney, who has been duly admitted to practice before the Supreme Court of the United States; and I further certify that a copy of the foregoing petition for a writ of certiorari was deposited in the United States mail, properly addressed and stamped, to the Attorney General of the State of Texas.

T. K. IRWIN, JR.

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT 14, SECTION 1
UNITED STATES CONSTITUTION

Due process and equal protection of laws * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 424

Bail forfeited, when

CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS

Whenever a defendant is bound by recognizance or bail bond to appear at any term of a court, and fails to appear on the day set apart for taking up the criminal docket, or any subsequent day when his case comes up for trial, a forfeiture of his recognizance or bail bond shall be taken.

ARTICLE 425

Manner of taking a forfeiture

CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS

Recognizances and bail bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the court house door, and, if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the State of Texas recover of

the defendant the amount of money in which he is bound, and of his sureties, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear.

ARTICLE 426

Citation to sureties

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

After the adjournment of the court, a citation shall issue notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final. It shall not be necessary to give notice to the defendant.

ARTICLE 433

Scire facias docket

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the scire facias or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, as defendants; and the proceedings had therein shall be governed by the same rules governing other civil suits.

ARTICLE 434

Sureties may answer at next term

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

At the next term of the court, after the forfeiture of the recognizance or bond, if the sureties have been duly notified, or at the first term of the court after the service of such notice, the sureties may answer in writing and show cause why the defendant did not appear, which answer may be filed within the time limited for answering in other civil actions.

ARTICLE 436

Causes which will exonerate

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

The following causes, and no other, will exonerate the defendant and his sureties from liability upon the forfeiture taken:

1. That the recognizance or bail bond is, for any cause, not a valid and binding undertaking in law. If it be valid and binding as to the principal, and one or more of his sureties, they shall not be exonerated from liability because of it being invalid and not binding as to another surety or sureties. If it be invalid and not binding as to the principal, each of the sureties shall be exonerated from liability. If it be valid and binding as to the principal, but not so as to the sureties, the principal shall not be exonerated, but the sureties shall be.

2. The death of the principal before the forfeiture was taken.

3. The sickness of the principal or some uncontrollable circumstance which prevented his appearance at court, and it must, in every such case, be shown that his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties unless such principal appear before final judgment on the recognizance or bail bond to answer the accusation against him, or show sufficient cause for not so appearing.

4. Failure to present an indictment or information at the first term of the court which may be held after the principal has been admitted to bail, in case where the party was bound over before indictment or information, and the prosecution has not been continued by order of the court.

ARTICLE 437

Judgment final

CODE OF CRIMINAL PROCEDURE OF THE STATE OF TEXAS

When, upon a trial of the issues presented, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties for the amount in which they are respectively bound; and the same shall be collected by execution as in civil actions. Separate executions shall issue against each party for the

amount adjudged against him. The costs shall be equally divided between the sureties, if there be more than one.

ARTICLE 438

Judgment final by default

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

When the sureties have been duly cited and fail to answer, and the principal also fails to answer within the time limited for answering in other civil actions, the court shall enter judgment final by default.

ARTICLE 439

The court may remit

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

If, before final judgment is entered against the bail, the principal appear or be arrested and lodged in jail of the proper county, the court may, at its discretion, remit the whole or part of the sum specified in the bond of recognizance.

ARTICLE 440

Forfeiture set aside

CODE OF CRIMINAL PROCEDURE
OF THE STATE OF TEXAS

When the principal appears before the entry of final judgment, and sufficient cause is shown for his failure to

appear before the forfeiture is taken, and a trial is had of the criminal action pending against him, he shall be entitled to have the forfeiture set aside. The criminal action against him shall stand for trial, but the State shall not be forced to try the same until reasonable time has been allowed to prepare for trial, and the State shall, in such case, be entitled to a continuance.

APPENDIX B

COPIES OF OPINIONS BELOW

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

PRIOR ORDER OF REVERSAL WITHDRAWN; REFORMED & AFFIRMED ON CONDITION OF REMITTITUR

OPINION BY
MORRISON
Judge

FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
JUNE 14, 1961
GLENN HAYNES
CLERK

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

OPINION
ON MOTION FOR REHEARING

The prior order reversing and remanding this cause is withdrawn.

We find the judgment of forfeiture to be excessive in the sum of $500.00 and, accordingly, if appellee files a remittitur in that amount within 20 days, the judgment will be reformed and affirmed; otherwise, the cause will be reversed and remanded.

Morrison, Judge

(Delivered June 14, 1961)

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM
DALLAS COUNTY

DISSENTING OPINION
ON
MOTION FOR REHEARING

OPINION BY
WOODLEY, Presiding Judge

FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
JUNE 14, 1961
GLENN HAYNES
CLERK

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

DISSENTING OPINION ON MOTION FOR REHEARING

I do not agree that the trial court's failure to adjudicate and determine whether any remission should be made, under the provisions of Art. 439 C.C.P., authorizes this court to effect a remission of a part of the amount of the judgment appealed from. Reference is made to my dissent in Ricard et al v. State, No. 33,297, this day decided.

Woodley, Presiding Judge

(Delivered June 14, 1961.)

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

STATE'S SECOND MOTION FOR REHEARING—GRANTED IN PART:

JUDGMENT AS TO APPELLANT MYRPH JOHNSON IS AFFIRMED.

JUDGMENT AS TO OTHER APPELLANTS IS REFORMED AND, AS REFORMED, AFFIRMED

OPINION BY
WOODLEY,
Presiding Judge

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
November 22, 1961
GLENN HAYNES,
CLERK

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

OPINION
ON STATE'S SECOND MOTION FOR REHEARING

As pointed out in the motion, no ground exists for finding the judgment against appellant Myrph Johnson, principal in the bond forfeited, excessive. As to this appellant the State's second motion for rehearing is granted and the judgment is affirmed.

The majority remain convinced that the judgment against the sureties is excessive in the sum of $500. The writer's views are shown in his dissent on the State's first motion for rehearing.

Subject to its second motion for rehearing, remittitur has been filed as required in the majority opinion on the State's first motion.

The judgment as to the appellants who are sureties upon the forfeited bail bond is reformed so as to provide for the

recovery against them of the sum of $250 and all costs, and as so reformed, the judgment is affirmed.

The appellant Myrph Johnson, as well as the sureties on his appeal bond, having appealed and having superseded the judgment against them, it is ordered that judgment be entered also against the sureties on the joint supersedeas bond.

Woodley, Presiding Judge.

(Delivered November 22, 1961.)

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

APPELLANTS MOTION FOR REHEARING
OVERRULED

OPINION BY
DICE
Judge

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

January 17, 1962
GLENN HAYNES,
CLERK

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

OPINION
ON APPELLANTS MOTION FOR REHEARING

Appellants insist that the final judgment of forfeiture entered against them should be reversed because at the time of the hearing, the principal Myrph Johnson was confined in jail and was not given an opportunity to appear in court and show cause why he failed to appear when his appearance bond was forfeited.

While the record reflects that at the time of the hearing, the principal Myrph Johnson was confined in jail, it further shows that he was brought into court and testified at the hearing.

No answer was filed by the principal, Myrph Johnson in the bond forfeiture proceedings and no request was made by him or on his behalf that he be present at the hearing.

Art. 426, V. A. C.C.P., which provides for the issuance of citation to the sureties in a bond forfeiture proceeding also

provides: "* * * It shall not be necessary to give notice to the defendant."

A judgment may be rendered against all parties without service of citation on the principal. Vaughn vs. State, 29 Tex. 278.

Under the record, we find no reason to set aside our opinion affirming the judgment rendered against the principal Myrph Johnson for the full amount of the bond in the sum of $750 and all costs.

The Motion for Rehearing is overruled.

DICE, Judge

(January 17, 1962)

Opinion approved by the Court.

APPENDIX C

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

MINUTES OF THE COURT

No. 33,266

MURPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

SECOND MOTION FOR REHEARING OVERRULED
WITHOUT WRITTEN OPINION
FEBRUARY 14, 1962

This cause came on to be heard on the Appellant's Second Motion for Rehearing and the same being considered, it is ordered, adjudged and decreed by the Court that the said motion be and the same is hereby in all things overruled.

APPENDIX D

No. 33,266

MYRPH JOHNSON, *et al.*,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

Appeal From Dallas County

ORDER STAYING ISSUANCE OF MANDATE

While we see no constitutional question, if counsel in good faith desires to apply to the Supreme Court of the United States for writ of certiorari, we would favor giving him the opportunity to do so, since this is a bond forfeiture case and the State of Texas is sufficiently protected by a supersedeas bond.

The application of the Appellants for a stay of the issuance of the mandate in this cause is granted, and the Clerk of the Court of Criminal Appeals is directed to stay the issuance of the mandate and all other proceedings upon the judgment against the Appellants for a period of ninety days from this date in order that they may apply to the Supreme Court of the United States for a writ of certiorari.

And the Clerk is further directed, in the event the writ is granted by the Supreme Court of the United States, to delay the issuance of the mandate until final action by that Court in the matter.

This the 14 day of February, 1962.

/s/ W. T. McDonald

Judge, Court of Criminal Appeals
of Texas.

FILED IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FEB. 14, 1962
Glenn Haynes
Clerk

Office Supreme Court, U.S.
FILED
JUL 23 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. [redacted] 103

MYRPH JOHNSON,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE STATE OF TEXAS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 936

MYRPH JOHNSON,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes Respondent, the State of Texas, and respectfully files its Brief in Opposition to Petition for Writ of Certiorari.

OPINION BELOW

The Court of Criminal Appeals of Texas, the highest court having bail bond forfeiture jurisdiction in Texas, reversed and remanded Petitioner's case on appeal on May 3, 1961. Thereafter that order was withdrawn and on Motion for Rehearing the court delivered a written opinion on June 14, 1961. There was also a dissenting opinion on the Motion for Rehearing which was delivered on June 14, 1961. On the State's second Motion for Rehearing an opinion was delivered dated November 22, 1961. Thereafter

the Petitioner filed a Motion for Rehearing and the court delivered a written opinion concerning this motion on January 17, 1962. Petitioner's second Motion for Rehearing was denied without written order on February 14, 1962. The Court of Criminal Appeals of Texas on February 14, 1962, delivered an order staying issuance of mandate until this Honorable Court acted on the Writ of Certiorari.

JURISDICTION

On appeal from the County Criminal Court of Dallas County, Texas, the case was originally reversed and remanded by the Court of Criminal Appeals of Texas, but this order of May 3, 1961, was withdrawn; and the court's written opinion on the Motion for Rehearing, dated June 14, 1961, held the judgment of forfeiture was excessive by $500.00. The presiding judge of the court delivered on the same day a dissenting opinion. Thereafter, on the State's second Motion for Rehearing, the Court of Criminal Appeals of Texas, in a written opinion dated November 22, 1961, held that the judgment against the Petitioner, Myrph Johnson, and the sureties was valid. On Petitioner's Motion for Rehearing the Court of Criminal Appeals of Texas, in a written opinion dated January 17, 1962, held it was not necessary to give notice to the Petitioner. Petitioner's second Motion for Rehearing was denied without written order on February 14, 1962. An order staying issuance of mandate was issued by the Court of Criminal Appeals of Texas on February 14, 1962, pending Petition for Writ of Certiorari to this Honorable Court. It is questioned by the Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States.

QUESTION PRESENTED

Will the Supreme Court of the United States review the presentation of evidence of the trial court, review the inter-

pretation and application of state procedural rules by the highest court in the State of Texas having bail bond forfeiture jurisdiction, and make its own determination of the interpretation and application of these rules, and hold that Petitioner has been deprived of due process of law or equal protection of law under the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1, reads in part as follows:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Articles 424, 425, 426, 428, 433, 434, 436, 437, and 438 of Vernon's Code of Criminal Procedure, provides:
Article 424:

> "Whenever a defendant is bound by recognizance or bail bond to appear at any term of a court, and fails to appear on the day set apart for taking up the criminal docket, or any subsequent day when his case comes up for trial, a forfeiture of his recognizance or bail bond shall be taken."

Article 425:

> "Recognizances and bail bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the court house door, and, if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear."

Article 426:

"After the adjournment of the court, a citation shall issue notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final. It shall not be necessary to give notice to the defendant."

Article 428:

"Sureties shall be entitled to notice by service of citation, the length of time and in the manner required in civil actions; and the officer executing the citation shall return the same as in civil actions."

Article 433:

"When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the scire facias or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, as defendants; and the proceedings had therein shall be governed by the same rules governing other civil suits."

Article 434:

"At the next term of the court, after the forfeiture of the recognizance or bond, if the sureties have been duly notified, or at the first term of the court after the service of such notice, the sureties may answer in writing and show cause why the defendant did not appear, which answer may be filed within the time limited for answering in other civil actions."

Article 436:

"The following causes, and no other will exonerate the defendant and his sureties from liability upon the forfeiture taken:

"1. That the recognizance or bail bond is, for any cause, not a valid and binding undertaking in law. If it be valid and binding as to the principal, and one

or more of his sureties, they shall not be exonerated from liability because of it being invalid and not binding as to another surety or sureties. If it be invalid and not binding as to the principal, each of the sureties shall be exonerated from liability. If it be valid and binding as to the principal, but not so as to the sureties, the principal shall not be exonerated, but the sureties shall be.

"2. The death of the principal before the forfeiture was taken.

"3. The sickness of the principal or some uncontrollable circumstance which prevents his appearance at court, and it must, in every such case, be shown that his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties unless such principal appear before final judgment on the recognizance or bail bond to answer the accusation against him, or show sufficient cause for not so appearing.

"4. Failure to present an indictment or information at the first term of the court which may be held after the principal has been admitted to bail, in case where the party was bound over before indictment or information, and the prosecution has not been continued by order of the court."

Article 437:

"When, upon a trial of the issues presented, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties for the amount in which they are respectively bound; and the same shall be collected by execution as in civil actions. Separate executions shall issue against each party for the amount adjudged against him. The costs shall be equally divided between the sureties, if there be more than one."

Article 438:

"When the sureties have been duly cited and fail to

answer, and the principal also fails to answer within the time limited for answering in other civil actions, the court shall enter judgment final by default."

Article 802 of Vernon's Penal Code of Texas, provides:

Article 802:

"Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor and upon coviction shall be punished by confinement in the county jail for not less than three (3) days nor more than two (2) years, and by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars. Provided, however, than the presiding judge in such cases at his discretion may commute said jail sentence to a probation period of not less than six (6) months."

STATEMENT OF THE CASE

Respondent denies each and every allegation of fact stated by Petitioner in his Petition, except those facts supported by the record and those facts specifically admitted by the Respondent.

This is a criminal bail bond forfeiture case in which Petitioner was charged by affidavit and information (Exhibits "A" and "B") with the offense of driving while intoxicated in violation of Article 802, Vernon's Penal Code of Texas, a misdemeanor offense. Petitioner was arrested on February 18, 1960, as shown by the capias which is attached to this response as Exhibit "C." On the same day, an appearance bond was signed by the Petitioner, and Lee J. Irwin and John R. Bacon as sureties, and approved by the Sheriff of Dallas County, Texas. The Appearance Bond

instanter is attached to this response as Exhibit "D." On March 14, 1960, the case was called and passed for the Defendant as shown by the docket sheet (Exhibit "E"). Mr. Lee J. Irwin on the 10th day of June, 1960, filed an affidavit as surety to be relieved from the bond which is attached to this response as Exhibit "F." On June 22, 1960, the case was called and reset for July 22, 1960, for disposition or bail bond forfeiture as shown by the docket sheet in this cause (Exhibit "E"). The case was called on July 22, 1960, and reset for disposition or bail bond forfeiture on August 26, 1960, as shown by the docket sheet (Exhibit "E"). On August 25, 1960, a judgment nisi was entered, the bond forfeited, and the new bond set at $1,000.00. On June 10, 1960, an alias capias was issued for the Petitioner, and is attached to this response as Exhibit "G." The judgment nisi is attached to this response as Exhibit "H." On September 19, 1960, a bond forfeiture alias capias was issued for the Petitioner and is attached to this response as Exhibit "I." Scire Facias Citation was filed on September 22, 1960, by the two sureties and is attached as Exhibit "J". After the judgment nisi was entered, the Petitioner was re-arrested on November 28, 1960, and on December 5, 1960, Defendant plead guilty to driving while intoxicated as shown by docket sheet (Exhibit "E"), and was sentenced to 30 days in jail and a $50.00 fine; the commitment is attached to this response as Exhibit "K." Petitioner filed a motion to set aside the judgment nisi on December 8, 1960, Exhibit "L" and on the next day filed an amended motion to set the judgment nisi aside (Exhibit "M").

A hearing was held on the bail bond forfeiture by Judge Shelby S. Cox, Judge of the County Criminal Court of Dallas County, Texas, on December 9, 1960, and after the hearing, a final judgment was signed by Judge Cox on December 21, 1960, and is attached to this response as

Exhibit "N." Motion for a new trial was given and the order overruling the Petitioner's and Defendant sureties' motion for a new trial and notice of appeal were entered on December 28, 1960, Exhibit "O." On December 30, 1960, the Petitioner and the two sureties filed a supersedeas appeal bond which was put into effect. The appeal bond is attached as Exhibit "P."

On May 3, 1961, the Court of Criminal Appeals of Texas delivered an opinion which was subsequently withdrawn. On May 17, 1961, the State's Motion for Rehearing was filed withdrawing the May 3 opinion and partially affirming the judgment was delivered on June 14, 1961. The dissenting opinion thereon is attached to this response as Exhibit "R." On June 28, 1961, the State's second Motion for Rehearing was filed and the opinion by the Court of Criminal Appeals of Texas in response thereto was delivered on November 22, 1961, Exhibit "S." On December 6, 1961, the Petitioner's Motion for Rehearing was filed; the opinion of the Court of Criminal Appeals of Texas in response thereto was delivered on January 17, 1962, Exhibit "T." Application for Stay of Mandate was filed by the Petitioner on February 14, 1962, and an order staying the issuance of mandate was issued by the Court of Criminal Appeals of Texas on February 14, 1962—the same date. The order is attached as Exhibit "U." On May 4, 1962, a Petition for Writ of Certiorari was filed by the Petitioner before this Honorable Court. By a letter dated June 22, 1962, the Court notified the Attorney General of Texas that such petition was docketed and requested this office to make response to the application.

Respondent urges that there is no substantial federal question presented for determination by the Supreme Court of the United States.

The Petition now before this Court is replete with asser-

tions that Petitioner was given no notice of the forfeiture hearing; that he was not present during the presentation of the case against said Petitioner; that Petitioner was not present during the presentation of sureties' defense except when he was brought from the jail to testify as a witness; that Petitioner was not advised by the trial court holding the hearing that he was a party to such suit and that Petitioner was not present before the court when the final judgment was rendered against him by the trial court. Each of these allegations has been considered and found to be without merit by the Court of Criminal Appeals of Texas. In the instant case, the exhibits attached hereto render the contentions of the Petitioner to be without merit. Every assertion has been considered and dismissed as lacking substantiality by the Court of Criminal Appeals of Texas or completely contradicted by the evidence here attached. None of the allegations here made are worthy of consideration by this Honorable Court.

ARGUMENT AND AUTHORITIES

Petitioner, in effect, relies on the Fourteenth Amendment of the United States Constitution as a basis of his allegation of deprivation of due process of law. In *Holden v. State*, 158 S.W. 2nd 772, 775 (Tex. Crim. App., 1942, cert. den. 316 U.S. 703, 1942), it was held that when an accused is tried in the state courts, state procedure would be followed. In *Adamson v. California*, 332 U.S. 46 (1947), this court cogently points out that the state may prescribe its own procedures in accordance with its ideas of the most efficient administration of criminal justice.

In order to decide Petitioner's complaints about no notice of the hearing, and that he was not present during the presentation of the case, it will be necessary to check the statutes concerning recognizances and bail bond forfeiture under the Texas statutes and the cases construing the sta-

tutes. Article 426, Vernon's Texas Code of Criminal Procedure, provides:

> "After the adjournment of the court, a citation shall issue notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final. *It shall not be necessary to give notice to the Defendant.*" (Emphasis added)

Therefore it follows that under Texas law no notice or citation is necessary to be served upon the Defendant in a forfeiture suit concerning a bail bond. In *Western Surety Co. v. United States*, 51 Fed. 2nd 470, (9th Cir., 1931), the court there said on page 472:

> "It is not a prerequisite to the forfeiture of a bail bond that the defendant be notified or that, in the courtroom, he be called to answer. It is his duty to follow the proceedings and to be in court when his presence is required. County of Los Angeles v. Delahunt, 99 Cal. App. 569, 279 P. 187, State v. Holtdorf, 61 Mo. App. 515. Likewise, it is not necessary that notice be given the surety to produce the body of the defendant in court. National Surety Co. v. United States, (C.C.A.) 29 F.2d 92."

This case construes federal law on forfeiture of a bail bond. The Court of Criminal Appeals of Texas, in *Bell v. State*, 186 S.W. 328 (1916) stated the Texas rule when it said:

> ". . . The next article prescribes that citation shall issue to the sureties only, not to the defendant. The reason no notice or citation is to be issued to him, but to his sureties only, is clear and certain. He is a party to the whole proceeding from start to finish by his mere signing the bail bond. His sureties are not, unless they are cited, because the statute is to that effect. Besides, when a defendant willfully forfeits

his bond, he is, or becomes, a fugitive, and it is contemplated in law that no citation can be served upon him, because he cannot be found."

This case follows *Vaughn v. State*, 29 Tex. Rep. 273 and *Curfman v. State*, 195 S.W. 194, (1917) also holds that under the law it is not necessary to serve the principal in a bail bond forfeiture case. Therefore, under Texas law and federal law, it is not necessary that notice be given to the Defendant in a bail bond forfeiture case so that Petitioner's complaint about his being given no notice of the hearing is thus without legal foundation.

In *State v. Wynne*, 181 S.W. 2nd 781, (1944) the court held that it is well settled that an action by the state or federal government on a criminal bail bond is civil, and not criminal, in its nature. This is also followed in *State v. Benedict*, 15 N.W. 2nd 248, (1944), where the court said the ordinary rules pertaining to judgments and civil actions are applicable in actions on bail bonds or recognizances and if the defendant or surety fail to appear a judgment by default may be entered. Thus, it seems that the Petitioner's allegations concern a criminal action and not a civil action due to the fact that under the Texas law as set out in Article 433, Vernon's Texas Code of Criminal Procedure, it provides:

"When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the scire-facies or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, as defendants; *and the proceedings had therein shall be governed by the same rules governing other civil suits.*" (Emphasis added)

Article 434, Vernon's Texas Code of Criminal Procedure states the time to answer shall be within the time prescribed

in other civil suits. Therefore, a bail bond forfeiture suit is a civil suit under Texas law and civil procedure applies, not criminal procedure.

Next, Petitioner complains that he was not present during the presentation of the case against him. He failed to make it known to anyone that he desired to be present and to participate in the trial. The principal cannot later complain of his failure to assert any privileges he might have after the trial is over. The principal in the case of *Brugemeister v. Anderson,* 259 S.W. 1078 (1924), requested and demanded his privilege to appear and tender issues, which request was specifically denied by the trial court, but reversed by the appellate court. If the Petitioner had filed an answer concerning the bail bond forfeiture proceedings, he would have been entitled to appear, but since he did not, then the rules of civil procedure would apply.

The next allegations of the Petitioner concerning that Petitioner was not present during the presentation of the sureties' defense or that he was not advised by the trial court that he was a party to such hearing and was entitled to counsel; and that he was not present when the final judgment was rendered against him in the trial court thus comes under rules of civil procedure as applied in the State of Texas. Under Texas law the Defendant is not required to be present during any part of the suit unless he wishes to. A default judgment may also be taken without the party being before the court. He is not guaranteed representation unless he wishes to have it and the State does not have to give him a lawyer in a civil proceeding. It seems the Petitioner is trying to bring a bond forfeiture action and its proceeding under criminal law. As is quoted in Article 433, Vernon's Texas Code of Criminal Procedure the proceedings therein are governed by rules of civil procedure, and thus the allegations of Petitioner are not to be

given the test that applies in criminal cases, but given the test that applies in civil actions.

"The federal court should not upset the judgment of the state courts except for the more impelling of reasons essential to preservation of federal constitutional rights." *Henley v. Ellis*, 228 Fed. 2nd 657, 5th Circuit (1956). Here we have on the one side Petitioner's bare self-serving assertions of facts which he claimed resulted in denial of due process. Respondent submits that none of these claims possibly can be accepted as conclusive or even persuasive evidence to compel this Court to give them sufficient credence to support the issuance of a writ of certiorari.

It is apparent that while in the first instance this Honorable Court should not entertain the Petition because the questions have been determined under state procedural rules by the highest court having bail bond forfeiture jurisdiction in Texas, even if the Court should decide to examine the assertions, it is equally clear that no substantial federal question is here presented.

Your Respondent herein submits that the evidence and the law clearly discloses that Petitioner has not been denied due process in any way; that Petitioner did not have to be given notice of the bail bond forfeiture hearing; that he does not have to be present during the presentation of the case against him under Texas civil procedure; that it is not necessary for him to be present during the presentation of his sureties defense; that he does not have to be given counsel or call witness or argue in his behalf concerning his case; and that he does not have to be taken before the trial court when the final judgment is rendered against him because this is a civil suit and a Defendant is not required to be present.

It seems to be the contention of the Petitioner and his

sureties that before the sureties and Petitioner can be held liable on a bail bond forfeiture it would be necessary for the Defendant, or in this case, the Petitioner, to be served with notice of the hearing, and that he would have to be present during the bail bond forfeiture hearing as well as have counsel. If these assertions were correct, a Defendant could skip the country or hide out so that sureties would never be liable under their contract on the bail bond between a state and themselves. The court in *United States v. Davenport*, 266 Fed. 425, held a recognizance in a criminal case is a judgment confessed of record, and a proceeding thereon by scire facias after forfeiture is merely to confirm such judgment.

Respondent respectfully avers that the record and the law before this Honorable Court conclusively show that Petitioner has been afforded all the aspects of due process of law and that the judgment on the bail bond forfeiture violates no provisions of the United States Constitution. Respondent respectfully urges that the Writ be denied in this case.

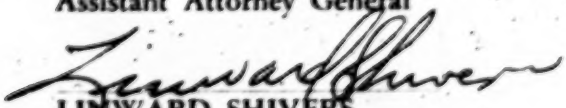
CONCLUSION

Respondent respectfully submits that Petitioner does not allege a substantial federal question; that his assertions lack merit and are of a frivolous nature; that such allegations involve controverted fact issues and have been resolved against Petitioner by the highest state court having jurisdiction in bail bond forfeiture cases, and that for the foregoing reasons this Petition for Writ of Certiorari be denied.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

SAM R. WILSON
Assistant Attorney General



LINWARD SHIVERS
Assistant Attorney General

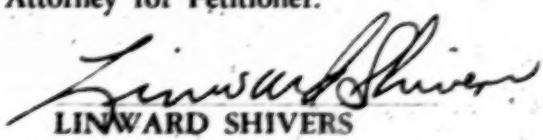
CHARLES R. LIND
Assistant Attorney General

ATTORNEYS FOR
RESPONDENT
THE STATE OF TEXAS

Capitol Station
Austin 11, Texas

CERTIFICATE OF SERVICE

I, Linward Shivers, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, Postage Prepaid, to T. K. Irwin, Jr., Irwin & Irwin, Attorneys, 215 Mercantile Continental Building, Dallas, Texas, Attorney for Petitioner.



LINWARD SHIVERS
Assistant Attorney General

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No. 103

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

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No. 103

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying the petition for writ of certiorari in this case, entered on October 8, 1962. Rehearing is sought at this time because, as more fully pointed out in the annexed petition, Petitioner is being deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

A *real* opportunity for a hearing was denied Petitioner. Such opportunity is one of the essential elements of due process. One of the maxims of the Common Law was that

"no man should be punished without an opportunity of being heard." *Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215.* Hence, no one may be legally divested of his property without a hearing in which he may contest any claim made against him, and be allowed to meet it with the law and the facts, and to show if he can that such claim is unfounded.

The hearing held in this case, principally during Petitioner's *involuntary* absence, was not a hearing held in accordance with due process of law. There is no hearing when a party does not know what evidence is offered or considered, and is given no *real* opportunity to test, explain or refute the same. *Interstate Commerce Commission v. Louisville & N.R. Co., 227 U. S. 88, 57 L. Ed. 431.*

This petition for rehearing is duly filed within the time permitted by the Rules of this Court.

Respectfully submitted,

T. K. IRWIN, JR.,
IRWIN AND IRWIN, *Attorneys,*
215 Mercantile Continental Building,
Dallas, Texas, RI 1-1411,
Attorneys for Petitioner.

By: T. K. Irwin Jr.

No. 103

In the

Supreme Court of the United States

OCTOBER TERM, 1962

MYRPH JOHNSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 8, 1962, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas in the above entitled case as prayed for in the petition filed May 4, 1962, and being No. 936, October Term, 1961.

At the time for filing of the petition for writ of certiorari in this cause, Petitioner did not clearly and distinctly bring to the attention of the Court that the conduct of the State Judiciary in this case denied Petitioner his existing remedy for the enforcement of a right without being afforded a

real opportunity to protect such right. Petitioner is aware that granting this petition for rehearing under these circimstances is a rare exception. *Hickman v. Taylor, 327 U. S. 808, 328 U. S. 876, 329 U. S. 495; Brinkerhoff-Faris Trust Co. v. Hill, 280 U. S. 604, 550, 281 U. S. 673;* see also Page 330 *Supreme Court Practice* by Robert L. Stern and Eugene Gressman.

Petitioner has adjudged against him a bond forefeiture without being accorded a "hearing" in accordance with due process of law. He was in Court only during part of the hearing and was, by direct order of the Court, removed therefrom before its conclusion, and without being advised of his rights, or even advised that he was a "party" to the proceedings.

Petitioner herein failed to call to the attention of this Court that the Bond Forfeiture Statutes of Texas fall into THREE classifications insofar as relief from a judgment nisi of forfeiture is concerned. Article 436, Code of Criminal Procedure of the State of Texas, deals with *EXONERATION*, and is applicable whether the principal appears or not. Article 439, Code of Criminal Procedure of the State of Texas, deals with the *discretion* of the Trial Court to remit the whole or part of the bond when the principal appears before final judgment of forfeiture, but *before he is tried* for the offense for which the bond was made. *Article 440*, Code of Criminal Procedure of the State of Texas, deals with the Principal's *RIGHT* to have the forfeiture set aside when he appears before the entry of final judgment and is *TRIED* for the offense for which the bond was made.

The Petitioner in this case falls within the provisions of Article 440, supra, in that he appeared and *was tried*, before final judgment of forfeiture was entered. This is the exact fact situation which led the Supreme Court of Texas, in *Burgemeister v. Anderson, 259 S. W. 1078*, to hold that Burgemeister was a "party" to all of the proceedings and "By the judgment nisi the Court acquires jurisdiction to adjudicate the matter of enforcing the Principal's obligation to the State, as well as that of the sureties, and, on the Principal's appearance and tender of issues excusing his failure to appear at the time of forfeiture, *the statutes entitle him to both a hearing and a determination* as to whether the judgment nisi shall be vacated in whole or in part or shall be made final."

Petitioner says that his involuntary removal from the courtroom before the conclusion of the "hearing", without being notified that he was a "party" to the proceedings, and without being advised that he was entitled to a full hearing in which he was allowed to make, by evidence and argument, a showing fairly adequate to show the impropriety of the action taken, was not a hearing in accordance with due process of law.

JUSTICE BRANDEIS in *Brinkerhoff-Faris Trust Co. v. Hill, 280 U. S. 604, 550; 281 U. S. 673*, states Petitioner's contention in words that Petitioner cannot hope to match: "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing reme-

dies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

The Trial Court in holding the hearing, principally during Petitioner's involuntary absence, and without advising him of his rights, or that he was even a party to the proceedings, failed to accord Petitioner due process of law.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari it is respectfully urged that rehearing be granted and, that, upon such rehearing, that a writ of certiorari issue to the Court of Criminal Appeals of the State of Texas.

Respectfully submitted,

T. K. IRWIN, JR.,
IRWIN AND IRWIN, *Attorneys*,
215 Mercantile Continental Building,
Dallas, Texas, RI 1-1411,
Attorneys for Petitioner.

By: T. K. Irwin Jr.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is prepared in good faith and not for delay and in counsel's opinion is restricted to the grounds specified in the rules of this Court.

T. K. IRWIN, JR.,
Attorney for Petitioner.

I hereby certify that a copy of the foregoing petition for rehearing was deposited in the United States mail properly addressed and stamped to the Attorney General of the State of Texas.

T. K. IRWIN, JR.,
Attorney for Petitioner.